Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DOUBLE H PLASTICS, INC.,

Petitioner,

v.

SONOCO PRODUCTS COMPANY,

Respondent.

BRIEF OF RESPONDENT SONOCO PRODUCTS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the court of appeals properly exercised its authority under Rule 52(a) of the Federal Rules of Civil Procedure to correct contradictory findings by a district court.

II. Whether the court of appeals (a) properly applied its established legal standard governing express evidence of predatory intent in primary line cases under Section 2(a) of the Robinson-Patman Act, and (b) whether that standard is appropriate.

III. Whether the petitioner's burden-of-proof argument (a) is relevant to the decision of this case, and (b) was properly raised in the courts below.

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OPINIONS OF THE COURTS BELOW

The statement of petitioner Double H Plastics, Inc. ("Double H") is incomplete in that it fails to state that the United States District Court for the Eastern District of Pennsylvania found that respondent Sonoco Products Company ("Sonoco") had not violated Section 2 of the Sherman Act through predatory pricing, and entered judgment for Sonoco with respect to both the Sherman Act and Robinson-Patman Act claims. 575 F. Supp. 389 (E.D. Pa. 1983). Double H did not appeal the adverse judgment on its Sherman Act claim.[1]

[1] In compliance with Rule 28.1, Sonoco states that it has no parent corporation and no publicly-held subsidiaries or affiliates. Two foreign affiliates of Sonoco are jointly owned with a publicly-held corporation, one with Domtar, Inc. (Canada) and the other with Australian Consolidated Industries (Australia).

COUNTERSTATEMENT OF THE CASE

I. Statement of Relevant Facts.

Business machine cores are spools that hold rolls of paper for adding machines and cash registers. The cores are made in two types, the smaller type fitting adding machines and the larger fitting cash registers. Business machine cores are made either of plastic or of fiber (*i.e.*, paper or cardboard). Most adding machine cores are made of plastic, while most cash register cores are made of fiber.

Petitioner Double H is the dominant manufacturer of plastic business machine cores. In the relevant period of 1979-1982, Double H's share of plastic business machine core sales ranged between 64% and 71%. Respondent Sonoco was historically a manufacturer of fiber cores. In the 1970's, plastic cores (made by Double H and other companies) displaced fiber as the principal material for adding machine cores, and Sonoco lost almost all of its adding machine core business. In an effort to regain its lost business, Sonoco began making its own plastic cores in early 1980.

Sonoco's new plastic cores had little effect on Double H's dominant position. In 1981, Double H sold $2.1 million in business machine cores (all plastic), while Sonoco's combined sales volume in the product was only $1.2 million ($461,000 in plastic cores and $721,000 in fiber cores).

NCR Corporation ("NCR"), the largest cash register core customer, bought fiber cores from Sonoco and from Sonoco's chief competitor in fiber cores, Crescent Paper Tube Co. ("Crescent"). Sonoco was forced to offer discounts to NCR in order to compete with Crescent's prices. For example, in 1981 Crescent sold fiber cash register cores to NCR for $9.15 per thousand. To compete

with Crescent, Sonoco offered the same core to NCR at $9.59 per thousand, compared to its $11.53 list price. Despite Crescent's lower prices, NCR bought about 25-30% of its needs from Crescent and about 70-75% from Sonoco.

In 1980, Double H began to quote prices on plastic cash register cores to NCR. Double H's prices ($8.12 per thousand) were much lower than either Crescent's prices or Sonoco's discounted prices. In other words, *Double H's own prices were more than 15% below the discounted Sonoco prices that Double H contends were illegally discriminatory.*

Although NCR's purchasing agent professed that "economics" were the major factor in NCR's choice of cores, NCR's conduct belied his words. Despite the availability of plastic cash register cores at much lower prices, NCR continued to buy fiber cash register cores exclusively, obtaining them from Crescent and Sonoco. In fact, when asked whether NCR would switch to plastic cores if the "economics" so dictated, the NCR purchasing agent responded: "NCR, as a company, I would have to say no." He testified that a switch could not be made without consulting both the manufacturing and marketing departments.

Even though Double H offered NCR the lowest prices by far of any competitor, and even though Double H is the dominant manufacturer of business machine cores, Double H maintains that Sonoco has injured competition by selling to NCR at prices that were substantially higher than either Crescent's or Double H's own. Double H claims that Sonoco's prices have "frozen" NCR in fiber cores even though NCR's actions have proven to be relatively indifferent to price, and even though—if Sonoco *did* raise its prices—NCR could continue to buy fiber

cores from Crescent at Crescent's pre-existing, lower prices.

II. Procedural History.

Double H filed an action against Sonoco in the United States District Court for the Eastern District of Pennsylvania, alleging that Sonoco had attempted, in violation of Section 2 of the Sherman Act, to monopolize the market for business machine cores, encompassing both fiber and plastic cash register and adding machine cores. Central to Double H's attempted monopolization claim was its allegation that Sonoco had engaged in predatory (below-cost) pricing.

Shortly before trial, Double H amended its Complaint to allege that Sonoco's fiber core sales to NCR violated Section 2(a) of the Robinson-Patman Act. The amended Complaint also added the specific allegation that Sonoco's fiber core sales to NCR were below-cost and predatory.

The district court found that Sonoco had not violated Section 2 of the Sherman Act. The court found that Double H failed to prove that Sonoco had engaged in predatory pricing. D.Ct. Op. 56a.[2] The district court also found that Sonoco's fiber core sales to NCR were profitable. D.Ct. Op. 57a. Sonoco had raised its fiber core prices, overcoming NCR's resistance, and the court found that Sonoco had not "intentionally sold below cost to keep NCR from switching to plastic so long as Double H is in the picture." *Id.*

Moreover, the court found that other evidence proved that Sonoco had not acted with predatory intent, because its plastic core pricing was the result of "stiff competition"

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[2] "Pet." refers to Double H's petition. "____ a" refers to the Appendix to Double H's petition.

and reflected nothing except "normal business goals." D.Ct. Op. 56a. The district court found that Double H had suffered merely "discomfort with competition" because "[r]ather than passively receiving orders and neglecting to 'make house calls,' it was forced to venture into its market and exhibit its wares." *Id.*

Turning to the Robinson-Patman Act claim, the district court found—in direct contradiction to its above-quoted findings—that Sonoco's fiber core prices reflected predatory intent because a single Sonoco memorandum stated that NCR would buy fiber cores "until the economics favor switching to plastics" and that other fiber core buyers were "reluctant" to switch until NCR did. D.Ct. Op. 59a. Double H adduced no other claimed evidence of an adverse effect on competition. The district court found that Double H had not attempted to establish anticompetitive effect by market analysis, and that its claim of below-cost pricing was unproven.

The district court did not accept Sonoco's defense that its prices to NCR simply met Crescent's competition (although the court also found that "had Sonoco offered its paper cores to NCR at the same price it offered them to its other customers, NCR would have bought from Crescent." D.Ct. Op. 63a). The court dismissed Double H's Robinson-Patman Act claim because Double H had failed to prove either the fact or the amount of antitrust injury. *Id.* at 62-65a.

Double H appealed the dismissal of its Robinson-Patman Act claim, but it did *not* appeal the dismissal of its Sherman Act claim, including the district court's findings that Sonoco's fiber and plastic core prices were not below cost, and its findings that Sonoco had not acted with predatory intent in the pricing of either type of core.

The Third Circuit affirmed the district court's dismissal of the Robinson-Patman Act claim, but on different grounds.[3] It held that the district court erred in finding a violation of the Robinson-Patman Act. The court noted the absence of evidence of anticompetitive effect through either market analysis or below-cost pricing. 3d Cir. Op. 25-26a. The court held that it was clear error for the district court to infer predatory intent and anticompetitive effect from the single Sonoco memorandum, because the lower court's finding of predatory intent was contradicted by its Sherman Act findings that no such predatory intent existed, and also because that memorandum "simply reveals that the defendant was aware of the realities of its own marketplace." *Id.* at 28a. The court noted that Double H's quoted prices to NCR for plastic cores were considerably lower than Sonoco's fiber core prices, but "[f]or reasons that remain unclear NCR has continued to buy paper cores from the defendant." 3d Cir. Op. 23a. The court also observed that Double H "remains a successful company," with 65-70% of all plastic business machine core sales. *Id.* at 24a.

In addition, the Third Circuit held that the Sonoco memorandum did not satisfy the legal test for express evidence of predatory intent set out in *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). The Third Circuit did not reach the questions of whether Sonoco's prices were lawful as good-faith meeting of Crescent's competition, or whether Double H had suffered antitrust injury. Judge Gibbons dissented.

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[3] In an initial opinion, vacated on Sonoco's motion for rehearing, the Third Circuit (Chief Judge Seitz dissenting) reversed the district court's finding of absence of injury to Double H as clearly erroneous.

We shall demonstrate that Double H's petition for a writ of certiorari should be denied. The Third Circuit correctly discharged its function under Fed. R. Civ. P. 52(a) by setting aside as clearly erroneous district court findings that were irreconcilably in conflict with its other unappealed and conclusive findings. An appeals court's rectification of particular factual conflicts in a lower court's opinion does not warrant review by this Court. Equally important, the court correctly concluded that Double H's evidence failed, as a matter of law, to satisfy the standard for predatory intent in the Third Circuit. The application of an established legal standard to the particular facts of record does not merit review by this Court.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' PROPER APPLICATION OF RULE 52(A) TO CORRECT CONTRADICTORY TRIAL COURT FINDINGS DOES NOT WARRANT REVIEW BY THIS COURT.

The Third Circuit applied the clear error standard of Rule 52(a) to correct a district court decision that was internally contradictory. The district court dismissed Double H's Sherman Act claims because it found that Sonoco had pursued normal, nonpredatory business goals. Yet, on the same set of facts, the district court found a violation of the Robinson-Patman Act based on Sonoco's supposedly predatory intent. The Third Circuit discharged its responsibility under Rule 52(a) as a reviewing court by accepting the district court's unchallenged Sherman Act findings, and by setting aside as clearly erroneous the district court's contradictory Robinson-Patman Act findings.

The Third Circuit did not engage in "appellate factfinding" on a question of intent (Pet. 16-17), for the district

court had found *two* sets of mutually exclusive facts, and they *both* related to Sonoco's intent. The Third Circuit respected the district court's factfinding role by accepting its unappealed Sherman Act holding that no predatory intent existed. When the two halves of a trial court opinion reach opposite results, on an intent question or any other, Rule 52(a) does not require the reviewing court to perform the impossible feat of deferring to both. Here, the reviewing court's choice was inevitable, for one set of findings—that there was no predatory intent—was unchallenged.[4]

In deciding Double H's Sherman Act claim, the district court found that Sonoco's intent was procompetitive and nonpredatory both generally with regard to all its business machine core sales, and specifically with regard to *the very same sales to NCR on which Double H's Robinson-Patman Act claims were based.* The district court found that Sonoco's desire that NCR switch to Sonoco plastic cores represented a "normal, in fact, expected business goal," and that Sonoco had increased its fiber core prices to NCR despite NCR's resistance. D.Ct. Op. 57a.[5] Sonoco's "documented efforts to raise its price

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[4] In *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963), confronted with inconsistent trial court findings as to the parties' intent, this Court—like the Third Circuit here—accepted one set of findings as correct and treated the other as clearly erroneous. Rule 52(a) does not immunize intent findings from appellate review. In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534 n.8 (1979), the Court sustained the court of appeals' reversal of a trial court's intent findings, describing the appellate court's "unavoidable duty" to "determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are."

[5] Sonoco had announced three price increases in the space of 15 months, and succeeded in implementing two of them.

to NCR for its fiber cores belies the conclusion that it has intentionally sold below cost to keep NCR from switching to plastic so long as Double H is in the picture." *Id.* Double H did not appeal these findings, and they therefore became conclusive and not open to review.

The district court also rejected Double H's claims that Sonoco had engaged in predatory pricing of its plastic business machine cores, finding that Sonoco's sales were not below cost, and reflected no more than "stiff competition" and the intent "to increase sales volume," a "normal business goal[]." D.Ct. Op. 56a. Sonoco expected Double H to retain a 60% market share in plastic cores for the foreseeable future, and "[t]he intent that can readily be inferred from this . . . calculation is that of competition with Double H rather than its elimination." D.Ct. Op. 57a.

But when the district court considered Double H's Robinson-Patman Act claim, the court took no account of its Sherman Act findings. Instead, the district court found that Sonoco's fiber core sales to NCR were animated by predatory intent because a Sonoco memorandum said that other cash register core customers would not buy plastic cores unless NCR did so first, and that NCR would buy fiber cores "until the economics favor switching to plastics." D.Ct. Op. 59a.

The district court's contradictory Sherman Act and Robinson-Patman Act findings could not both be correct, and the Third Circuit properly credited the district court's findings of procompetitive intent and "normal business goal[s]" in "the unchallenged portion of its opinion addressing the Sherman Act claim." 3d Cir. Op. 28a. Moreover, the Third Circuit detected no evidence of an intent to injure Double H in the single memorandum on which the court below had relied for its Robinson-Patman

Act finding, but only a nonpredatory "aware[ness] of the realities of its own marketplace." *Id.* The Third Circuit therefore set aside the finding of predatory intent as clearly erroneous, and held that Sonoco had not violated the Robinson-Patman Act.

Moreover, as a matter of law, as well as on the particular facts of this case, predatory intent cannot have one meaning under Section 2 of the Sherman Act and a different meaning under Section 2(a) of the Robinson-Patman Act on the same set of facts. "Where . . . a price differential threatens a primary line injury, . . . [Section 2 of the Sherman Act and Section 2(a) of the Robinson-Patman Act] are directed at the same economic evil and have the same substantive content." *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).[6]

Rule 52(a) invests a reviewing court with the power to set aside contradictory trial court findings as clearly erroneous. This Court has itself exercised that power. *United States* v. *General Motors Corp.*, 384 U.S. 127, 142 (1966) ("[W]e regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory 'finding' that there had been no 'agreement' among the defendants

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[6] *Accord, D.E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F.2d 1431, 1438-40 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3513 (1984); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1041-42 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). The Federal Trade Commission held in *International Telephone & Telegraph Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188 at 23,095 (July 25, 1984) that "[w]hen predatory intent or predatory pricing are relied upon to establish primary line injury to competition in violation of Section 2(a), the standards that govern the intent and conduct components of the attempted monopolization offense should apply." (footnote omitted)

and their alleged co-conspirators."); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963).

The Third Circuit simply performed the function that Rule 52(a) prescribes. There is no reason for this Court to review, on the particular evidence in this record, whether the conflict in the district court's opinion might have been resolved differently.[7] "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Double H makes much of the fact that the author of the document on which the district court based its Robinson-Patman Act finding testified at trial. Pet. 17-18. But the same witness (the general manager of Sonoco's plastics division) testified on the Sherman Act claims, and the district court relied on his testimony in deciding those claims in Sonoco's favor. D.Ct. Op. 55a. The district court heard testimony and observed demeanor in both the Sherman Act and Robinson-Patman Act halves of the case; its opportunity to do so does not give one part of its opinion greater weight than the other.[8]

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[7] This case's lack of significance beyond the immediate parties to the dispute is underlined by the failure of any Third Circuit judge in active service to vote in favor of Double H's petition for rehearing in banc. Judge Gibbons, the dissenting judge below, voted solely for panel rehearing, and did not vote for rehearing in banc. 69-70a.

[8] Because the district court's Robinson-Patman Act finding of predatory intent rested primarily on a document, the Third Circuit could examine that finding more searchingly than one based on oral evidence. "The same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony . . . but the presumption has lesser force in the former situation than in the latter." *Bose Corp.* v. *Consumers Union*, 104 S. Ct. 1949, 1959 (1984). *See also United States* v. *General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966).

Double H maintains that the district court's finding of predatory intent could not have been clearly erroneous because Judge Gibbons said that the evidence "certainly tend[s] to support that conclusion." 3d Cir. Op. 34a (dissent). But the asserted existence of contrary evidence does not foreclose a finding of clear error. "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). Indeed, Judge Gibbons himself described the evidence as "perhaps not compelling a conclusion that Sonoco granted NCR price discrimination for [a] predatory purpose." 3d Cir. Op. 34a (dissent).

Finally, Double H urges that Judge Rosenn could not have harbored "the '*definite and firm*' conviction that a mistake has been made" because after initially concurring with Judge Gibbons, he voted for panel rehearing and then joined Chief Judge Seitz in setting aside the district court's finding. Pet. 18 (emphasis in original). But Rule 52(a) does not forbid a court to grant a motion for rehearing; a judge can arrive at a "definite and firm conviction" on reconsideration as well as in the first instance. The fact that this case was decided on rehearing shows only that the Third Circuit approached its review of this record with careful attention.

In short, this case presents nothing more than the familiar application of Rule 52(a) to resolve an inherent conflict in a district court opinion. Appellate courts perform this task regularly, and the Third Circuit in doing so neither abused its function nor created an issue that requires review by this Court.

II. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The district court's findings on the Robinson-Patman count were contrary to the Third Circuit's predatory intent standard. In fact, the district court did not even acknowledge the existence of the proper legal standard. The court of appeals rectified this error. Its decision analyzes the facts within the framework of the Third Circuit's standard, a standard that is entirely consistent with this Court's decisions. There is therefore no reason for this Court to review this case.

A. Unlike The District Court, The Court Of Appeals Correctly Followed The Third Circuit's Legal Standard On Predatory Intent.

In the Third Circuit, in primary line cases, "[t]here are two basic means of meeting the competitive injury requirement: (1) actual competitive injury shown by market analysis; and (2) predatory intent from which competitive injury may be inferred." *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). Predatory intent may be shown by "(a) express evidence; and (b) by inference from 'below-cost' pricing." *Id.*

The court of appeals agreed with the district court that Double H failed to offer any market analysis and instead relied on evidence of predatory intent. 3d Cir. Op. 25a.[9]

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[9] Double H claims to have proven competitive injury by "market analysis" because cash register core customers assertedly would not switch from fiber to plastic unless NCR did so first. Pet. 12-13. But both the district court (59a) and the Third Circuit (25a) found no proof by market analysis. Whether or not NCR was the industry leader, Sonoco's prices did *not* "freeze" NCR as a user of fiber cores. Sonoco's fiber core competitor, Crescent, sold fiber cores to NCR at prices

The court of appeals considered both the "below-cost pricing" and the "express evidence" elements of the predatory intent test. It further agreed with the district court's unchallenged finding that Sonoco "did not sell paper cores to NCR at prices below cost." *Id.* at 26a. It concluded that "[t]he plaintiff's case therefore turns on express evidence of predatory intent." *Id.*

The Third Circuit then determined that the district court erred in finding express evidence of predatory intent. Not only were the district court's findings internally contradictory (see Section I herein), but also the district court completely ignored the applicable legal standard. In *O. Hommel*, the Third Circuit, after reviewing the legislative history of the Clayton Act, determined that "predatory intent is an intent to destroy a rival with the ultimate purpose of acquiring a monopoly in a particular locality." 659 F.2d at 347. It therefore held that "[t]o be relevant, express evidence of predatory intent should demonstrate the alleged predator's intention of sacrificing present revenues with the hope of obtaining monopoly profits." *Id.* at 348.[10]

Without even referring to this standard, much less applying it to the evidence, the district court found that

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lower than Sonoco's. If Sonoco were to raise its prices (or, for that matter, discontinue production), NCR could continue to use fiber cores, buying them from Crescent at Crescent's prevailing prices. The district court found that "had Sonoco offered its paper cores to NCR at the same price it offered them to its other customers, NCR would have bought from Crescent." D.Ct. Op. 63a.

[10] Double H, relying on Judge Gibbons' dissent, asserts that the Third Circuit has "establish[ed] an impossible evidentiary standard." Pet. 10. But Judge Gibbons premised his dissent on the patently incorrect view that *O. Hommel* applies only to cases of below-cost pricing, and not to cases involving "direct evidence" of predatory

Sonoco acted with predatory intent. In contrast, the court of appeals, applying the *O. Hommel* test, concluded that "[t]here is no evidence to support a factual inference that the defendant is sacrificing present revenues for the purpose of injuring the plaintiff." 3d Cir. Op. 28a. In particular, upon reviewing the memorandum on which the district court most heavily relied, the court of appeals said:

> The internal memorandum on which the district court relied states simply that (1) NCR is the defendant's major paper core customer, (2) "economics" will determine whether NCR stays with paper cores or switches to plastic, and (3) other members of the market will not switch until NCR does so. There is nothing in this document that suggests that the defendant's primary purpose in offering the discount to NCR was to injure the plaintiff. Instead, the document simply reveals that the defendant was aware of the realities of its own marketplace, and evidence of such awareness, standing alone, cannot support an inference of predatory intent.

Id. at 27a-28a. In short, the flaws in the district court's opinion—its internally contradictory findings and its failure to apply the correct legal standard for evaluating purportedly express evidence of predatory intent—have been fully corrected by the Third Circuit's decision.

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intent. 3d Cir. Op. 34a n.3 (dissent). To the contrary, *O. Hommel* (as noted above) specifically sets out the legal standard for "express evidence" of predatory intent. 659 F.2d at 348. In other words, this case did not "establish" a standard for express evidence of predatory intent, let alone an "impossible" one. Judge Gibbons failed to perceive that this case simply applied the accepted standard of *O. Hommel*.

B. The *O. Hommel* Competitive Injury Standard Is Consistent With Decisions Of This Court.

Double H claims that the *O. Hommel* competitive injury standard conflicts with two cases in this Court holding that competitive injury is established prima facie by proof of a substantial price discrimination between competing purchasers over time. Pet. 10. Double H sees conflict where none exists.

The holdings in the two cases on which Double H relies are inapplicable because those cases dealt with a much different type of competitive injury than is involved here. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), the issue was whether competitive injury occurred among favored and disfavored *buyers* ("secondary-line" competition). In *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the price discrimination resulted in competitive injury among buyers (secondary-line competition) through competitive injury to buyers' customers ("tertiary-line" competition). Neither of these cases involved primary-line competitive injury (*i.e.*, injury at the level of competition between the discounting *seller and its competitors*).

In contrast, the claimed competitive injury in this case is solely on the primary-line level. Double H's theory at trial was that Sonoco's discounts to NCR injured competition between Sonoco and its competitor, Double H. And there is not one finding by the district court of injury to secondary-line competition.

There is a fundamental distinction between Section 2(a) cases involving claims of primary-line competitive injury and those involving alleged secondary-line injury. While secondary-line competitive injury is established prima facie by proof of a substantial price discrimination between competing purchasers over time, *Morton Salt*, 334

U.S. at 50-51, no decision of this Court has held or even intimated that this standard also applies to primary-line cases. On the contrary, in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), a primary-line case, this Court indicated that a more rigorous standard applies to primary-line cases. The Court specifically noted that predatory intent might be relevant to the issue of competitive injury, and it said

> Of course we do not depart from our holding in Federal Trade Comm. v. Morton Salt . . . as to adequacy of proof of tendency to injure competition in cases involving discrimination between purchasers. The instant case, as we have pointed out, involves differences in prices among competing sellers.

363 U.S. at 552 n.21. Indeed, the *Anheuser-Busch* Court treated as irrelevant the competitive impact, or absence thereof, of price discrimination on competing purchasers.

> The existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned.

363 U.S. at 546.

In the years since *Anheuser-Busch* was decided, commentators and the Federal Trade Commission have recognized that the standard for proving competitive injury in secondary-line cases is not applicable to primary-line cases.[11] The FTC, in its most recent Robinson-Patman

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[11] A leading treatise on the Robinson-Patman Act, F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 124 (1962), observes that

> Although a doctrinal consistency may be professed, price variations challenged for their impact at the *seller's* level are con-

Act case, held that "[t]he injury to competition standards in primary line and secondary line cases differ." *International Telephone & Telegraph Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188 at 23,094 (July 25, 1984). Moreover, the FTC cited *this very case—Double H Plastics, Inc.* v. *Sonoco Products Company* (as well as *O. Hommel*)—as embodying the proper legal standard for competitive injury in primary-line cases. *Id.* at 23,095 n.103. The courts defer to the FTC's expertise in interpreting the Robinson-Patman Act (*FTC* v. *Morton Salt Co.*, 334 U.S. at 54), and the FTC's acceptance of the legal standard applied by the Third Circuit in this case lends powerful support to its correctness.

Double H ignores the distinction drawn by this Court in *Anheuser-Busch* and claims that the secondary-line standard is applicable to primary-line cases because in *Falls City* the Court said (citing *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 522 (1963)) that the Robinson-Patman Act "is of general applicability and prohibits discriminations generally." Pet. 11. This statement in *Falls City* has no relevance to this case. The Court said *nothing* about extending the *Morton Salt* standard to primary-line cases. The *Sun Oil* case involved only secondary-line competition. Indeed, in *Sun Oil* the Court said: "Nothing we say in this case—involving injury only to so-called 'secondary-line competition,' that is, competition among buyers—is in-

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demned only after a more forceful demonstration of inimical competitive impact than might satisfy a charge of injurious effect on the customer level. The distinction appeared in the Supreme Court's *Anheuser-Busch* decision of 1960, where the Court noted that the broad *Morton Salt* principle which sanctioned some inferences of competitive "injury" from the mere existence of substantial price variations pertained to "discrimination between purchasers," while a more far-ranging inquiry seemed appropriate to assess "differences in prices among competing sellers." [citing 363 U.S. at 552 n.21]

consistent with Federal Trade Comm. v. Anheuser-Busch, Inc. . . ." 371 U.S. at 527 n.16. In short, Double H has identified no decision of this Court which conflicts with the holding in *O. Hommel* that, in primary-line cases, competitive injury must be established either by market analysis or by proof of predatory intent.

III. PETITIONER'S BURDEN-OF-PROOF ARGUMENT SHOULD NOT BE REVIEWED BY THIS COURT BECAUSE IT IS IRRELEVANT AND WAS NOT RAISED BELOW.

For the first time in this lawsuit, Double H contends that in a Section 2(a) primary-line case, proof of price discrimination satisfies a plaintiff's *initial* burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition. This argument is obviously an afterthought. Double H tried the case not on this theory, but rather on the established theory that competitive injury could be established only upon *Double H's proof* of predatory intent or *Double H's proof* of actual competitive injury. Double H never suggested that the burden of proof should shift to Sonoco upon proof that Sonoco sold cores to NCR at a discount. In other words, Double H has taken the anomalous position of asking this Court to reject the legal theory upon which it relied in the district court and in the court of appeals.

Double H's belated burden-of-proof argument is irrelevant because this case was not decided on the basis of whether Double H had carried its "*initial* burden of showing injury to competition." *John B. Hull, Inc.* v. *Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (emphasis added). This case was decided after a full trial on the merits, in which Sonoco rebutted whatever inference of

injury to competition arguably flowed from the mere fact of price discrimination. Sonoco proved that its sales to NCR were profitable (*i.e.*, above cost) (D.Ct. Op. 57a), that Double H grew and prospered as the dominant seller of business machine cores (3d Cir. Op. 23-24a), that Double H's prices were 15% lower than Sonoco's (*id.* at 24a), that Crescent was ready and able to supply NCR with fiber cores even if Sonoco eliminated its discount (D.Ct. Op. 63a), and that Sonoco's motives were "within the bounds of sound and legal business judgment." (3d Cir. Op. 28a). Assuming *arguendo* that the burden of proof shifted to Sonoco, Sonoco carried that burden. The asserted conflict between the circuits to which Double H points is thus academic, and would require this Court to render an advisory opinion if Double H's petition were granted. Under the asserted Second Circuit rule, the same result is mandated: judgment for Sonoco.

Double H's burden-of-proof argument is unsuitable for review for the additional reason that only in exceptional circumstances does this Court review questions not raised by the petitioner in the district court or in the court of appeals. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Rogers* v. *Herman Lodge*, 458 U.S. 613, 628 n. 10 (1982). Double H's burden-of-proof question presents no such exceptional circumstances. It is simply a last-ditch effort by Double H to resuscitate a case that was correctly decided against it.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 19, 1984